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11 **UNITED STATES DISTRICT COURT**
12 **NORTHERN DISTRICT OF CALIFORNIA**
13
14 FEDERAL TRADE COMMISSION
15 Plaintiff,
16 v.
17 MICROSOFT CORPORATION, et al.
18 Defendant.
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Case No. 23-cv-02880-JSC

**NON-PARTY NINTENDO OF AMERICA
INC. STATEMENT PURSUANT TO
LOCAL RULE 79-5(f) AS TO WHY ITS
CONFIDENTIAL INFORMATION
SHOULD BE FILED UNDER SEAL**

1 Pursuant to N.D. Cal. Civil Local Rule 79-5, Non-Party Nintendo of America Inc.
 2 (“NOA”) hereby submits this Statement as to why its confidential information contained in
 3 Plaintiff’s exhibits PX3066, PX3161, PX3219, PX3221, PX3270, PX8002 and Defendants’
 4 exhibits RX2001, RX2002, RX2040, RX2058, RX2065, RX2089, RX2096, RX2104, RX2106,
 5 RX2108, RX2109, RX2111, RX2116, RX2124, RX2125, RX2126 and RX2127 should be filed
 6 under seal (the “Statement”). This Statement is made following the receipt of Plaintiff’s letter
 7 dated June 18, 2023, and Defendants’ emails dated June 19 and 20, 2023, identifying NOA
 8 documents they intend to use as exhibits at the upcoming evidentiary hearing in the action
 9 captioned above.

10 **I. INTRODUCTION**

11 On June 18, 2023, Plaintiff informed NOA that it was in the process of identifying certain
 12 exhibits Plaintiff intended to offer at the evidentiary hearing set to begin June 22, 2023. (Dkt.
 13 No. 76), including certain documents that NOA produced in connection with the Federal Trade
 14 Commission’s (“FTC”) review and subsequent administrative proceeding challenging the
 15 proposed acquisition at issue in this proceeding. Defendant Microsoft Corp. (“Microsoft”) sent a
 16 similar email on June 19, 2023 regarding NOA documents it and Defendant Activision Blizzard,
 17 Inc. (“Activision”) intend to use at the evidentiary hearing.

18 Plaintiff and Defendants further informed NOA that pursuant to the Court’s previous
 19 order (Dkt. No. 76), the parties were to file a Joint Statement and exhibit list, identifying which
 20 exhibits they intended to present at the evidentiary hearing and where on the docket the Court
 21 could locate the related N.D. Cal. Civil Local Rule 79-5 statement and/or declarations. The Joint
 22 Statement was filed on June 20, 2023. (Dkt. No. 129). NOA filed a pending request for an
 23 extension of time on June 20, 2023. (Dkt. No. 136).

24 As discussed in this Statement, the NOA documents on the parties’ exhibit lists contain
 25 NOA’s confidential information that was produced to the FTC in connection with the FTC’s
 26 investigation and then in the still-pending FTC Part 3 administrative proceeding, both regarding
 27 Microsoft’s proposed acquisition of Activision. NOA was not a target of the FTC’s review of
 28 the proposed acquisition, nor is NOA a party to the Part 3 administrative proceeding or this

1 federal court action.

2 The Federal Trade Commission Act broadly governs confidential information submitted
 3 pursuant to both FTC investigations and administrative litigation proceedings. For example, the
 4 Act instructs that the Commission “shall not have any authority to make public any trade secret
 5 or any commercial or financial information which is obtained from any person and which is
 6 privileged or confidential.” 15 U.S.C.S. § 46(f).¹ For administrative litigation proceedings, the
 7 Act designates as privileged and confidential, *inter alia*, trade secrets, commercial and financial
 8 information, and competitively sensitive information. 16 C.F.R. § 4.10(g). The Administrative
 9 Law Judge (“ALJ”) presiding over the proceeding entered a Protective Order Governing
 10 Confidential Material on December 9, 2022 “[i]n order to protect the parties and third parties
 11 against improper use and disclosure of confidential information.” 16 C.F.R. § 3.31(d). (FTC
 12 Dkt. No. 9412, Document No. 606385, Dec. 9, 2022).

13 Additionally, the FTC’s current proposed Protective Order for this proceeding defines
 14 “Confidential Information” to include “(i) information copied or extracted, summarized or
 15 compiled from Confidential Information, and (ii) testimony, conversations, or presentations that
 16 might reveal Confidential Information.” (Dkt. No. 112-1). NOA filed a statement in support of
 17 the FTC’s proposed Protective Order (Dkt. No. 156) and believes it would protect the
 18 presentation of information that would reveal NOA’s confidential business strategy.

19 **II. APPLICABLE LEGAL STANDARD**

20 While the public has a right of access to the Court’s files, “[i]n the case of non-
 21 dispositive motions . . . the presumption in favor of public access does not apply with equal
 22 force.” *Prosurance Grp., Inc. v. Liberty Mut. Grp., Inc.*, 2011 WL 704456, at *1 (N.D. Cal. Feb.
 23 18, 2011) (citing *Kamakana v. City and County of Honolulu*, 447 F.3d 1172, 1178 (9th Cir.
 24 2006)). “Thus, a showing of good cause will suffice to justify sealing material attached to non-
 25

26 ¹ See also 15 U.S.C. § 57b-2 (regarding documents and transcripts of oral testimony received by a federal
 27 agency pursuant to compulsory process or investigation, “no documentary material, tangible things, reports or
 28 answers to questions, and transcripts of oral testimony shall be available for examination by any individual other
 than a duly authorized officer or employee of the Commission without the consent of the person who produced the
 material, things, or transcripts”).

1 dispositive motions.” *Id.* Courts have applied the good cause standard when reviewing motions
 2 related to a preliminary injunction. *See Jam Cellars, Inc. v. Wine Grp. LLC*, 2020 WL 5576346,
 3 at *2 (N.D. Cal. Sept. 17, 2020).

4 Non-parties receive special deference when issues of confidentiality are considered. *See*
 5 *United States v. Bazaarvoice, Inc.*, 2014 WL 11297188, at *1 (N.D. Cal. Jan. 21, 2014) (granting
 6 motion to seal third-party trial exhibits, noting that disclosure could “cause damage to third
 7 parties if made public” and would “chill investigations in the future where third-party documents
 8 are essential”).

9 Under Rule 26(c), “a trial court has broad discretion to permit sealing of court documents
 10 for, among other things, the protection of ‘a trade secret or other confidential research,
 11 development, or commercial information.’ Fed. R. Civ. P. 26(c)(1)(G). The Ninth Circuit
 12 adopted the definition of “trade secrets” set forth in the Restatement of Torts, finding that ‘[a]
 13 trade secret may consist of any formula, pattern, device or compilation of information which is
 14 used in one’s business, and which gives him an opportunity to obtain an advantage over
 15 competitors who do not know or use it.’” *Fitzhenry-Russell v. Keurig Dr. Pepper Inc.*, 345 F.
 16 Supp. 3d 1111, 1120 (N.D. Cal. 2018) (citing *Clark v. Bunker*, 453 F.2d 1006, 1009 (9th Cir.
 17 1972)).

18 **III. ARGUMENT**

19 Good cause exists to file NOA’s information under seal because the information consists
 20 of NOA’s confidential business information, the disclosure of which would cause competitive
 21 injury. Courts have found compelling reasons – a standard *higher* than the one required here – to
 22 seal confidential information that could harm a party’s competitive standing. *See Snapkeys, Ltd.*
 23 *v. Google LLC*, 2021 WL 1951250, at *3 (N.D. Cal. May 14, 2021).

24 **A. Plaintiff’s Exhibits**

25 PX3161 is an internal, highly sensitive and confidential NOA report that analyzes which
 26 consumer segments Nintendo should prioritize, as well as which products and messaging can
 27 most effectively reach those audiences. (Declaration of Steven Singer, June 21, 2023 (“Singer
 28 Decl.”), ¶¶ 6-7). This report is not generated regularly, but rather was created specifically to

1 analyze and review detailed consumer console use by household, data which is closely guarded
 2 at NOA. (*Id.* ¶¶ 6-7). Disclosure of this analysis will allow competitors direct insight into
 3 NOA's confidential business information and strategy, causing competitive harm. (*Id.* ¶¶ 4, 6-7).
 4 If this information were to be revealed, NOA's competitors and potential business partners
 5 would gain understanding into NOA's internal deliberations, how NOA builds and maintains its
 6 relationship with customers, and strategies in the highly competitive gaming market. (*Id.* ¶¶ 4, 6-
 7). *See, e.g., In re Qualcomm Antitrust Litig.*, 2022 WL 4137580, at *2 (N.D. Cal. Aug. 26,
 8 2022) ("confidential business information" in the form of 'license agreements, financial terms,
 9 details of confidential licensing negotiations, and business strategies' satisfies the 'compelling
 10 reasons' standard." (emphasis added)).

11 PX3066 and PX3270 are confidential documents that are only available to developers
 12 registered under Nintendo's Developer Portal.² Access to the Developer Portal requires the
 13 developer to agree to a non-disclosure agreement. The developers are instructed not to duplicate,
 14 copy, print, transfer, loan, or otherwise disseminate the information within the Developer Portal
 15 without the express prior approval of Nintendo. The documents include specific Switch
 16 hardware specifications, system features, and documentation for developers. (Singer Decl. ¶ 5).
 17 *See Arista Networks, Inc. v. Cisco Sys.*, 2017 WL 6043303, at *3-4 (N.D. Cal. Nov. 28,
 18 2017) (finding that disclosure of internal assessments of products and development strategies
 19 would result in competitive harm and thus the information is sealable). When the public release
 20 of documents could give competitors an unfair advantage in the development or marketing of
 21 rival products, courts have sealed those documents. *Exeltis USA Inc. v. First Databank, Inc.*,
 22 2020 WL 2838812, at *2 (N.D. Cal. June 1, 2020). Here, competitors and rival developers might
 23 exploit the information in these documents to create and market products that would compete
 24 directly with NOA resulting in competitive harm, and hackers/cheaters may utilize the

26
 27 ² Nintendo's Developer Portal gives controlled access to Nintendo developer tools and resources to create
 28 and publish games and applications for current Nintendo platforms. (Singer Decl. ¶ 5).

1 information to compromise Nintendo hardware. (Singer Decl. ¶¶ 4, 5).

2 PX3219 and PX3221 are highly confidential, communications and negotiations between
 3 some of the highest-level executives at NOA and Microsoft. (Singer Decl. ¶ 9). Disclosure of
 4 confidential negotiations between NOA and Microsoft would result in substantial harm to
 5 NOA's competitive standing as competitors would undoubtedly seek to leverage such
 6 information in potential future negotiations with NOA with the result being that NOA's
 7 negotiation position would be compromised. (*Id.* ¶¶ 4, 9). *!See* *Lenovo (United States) Inc. v.*
 8 *IPCom GmbH & Co., KG*, 2022 WL 2313948, at *2 (N.D. Cal. June 28, 2022) (ruling that there
 9 are compelling reasons to seal information relating to the specific details and substance of
 10 licensing negotiations).

11 Alternatively, NOA seeks at minimum to seal the names and email addresses contained in
 12 the emails to protect the privacy of those individuals. *See Am. Automobile Ass'n of N. Cal., Nev.,*
 13 *& Utah*, 2019 WL 1206748, at *2 (N.D. Cal. Mar. 14, 2019) (finding compelling reasons to seal
 14 personally identifiable information, "including names, addresses, phone numbers, and email
 15 addresses"); *see also* *Nursing Home Pension Fund v. Oracle Corp.*, 2007 WL 3232267, at *2
 16 (N.D. Cal. Nov. 1, 2007) ("The Ninth Circuit has found that compelling reasons exist to keep
 17 personal information confidential to protect an individual's privacy interest and to prevent
 18 exposure to harm or identity theft." (citations omitted)).

19 PX8002 is a declaration from an NOA executive prepared by NOA and outside counsel
 20 relating to the FTC's prior investigation before the related FTC Part 3 administrative litigation
 21 proceedings commenced. (Singer Decl. ¶ 13). The declaration that NOA seeks to seal was
 22 designated as confidential under FTC confidentiality rules. (*Id.* ¶ 13). NOA seeks to seal the
 23 declaration because it contains confidential and proprietary business information relating to
 24 NOA's strategy and how it competes in the gaming market. (*Id.* ¶ 13). *See Finisar Corp. v.*
 25 *Nistica, Inc.*, 2015 WL 3988132, at *4 (N.D. Cal. June 30, 2015) (granting motion to seal for
 26 transcripts designated Highly Confidential-Attorneys' Eyes Only pursuant to a Stipulated
 27 Protective Order because testimony contained confidential, trade secret, and proprietary
 28 information related to products and business practices).

1 **B. Defendants' Exhibits**

2 RX2096 is an internal, confidential report relating to a survey that NOA's Business
 3 Analysis and Planning team commissioned to examine consumer perception and interest in
 4 Nintendo Switch Online. (Singer Decl. ¶¶ 6, 8). The study also analyzes how to advertise the
 5 platform to potential users and how the platform is perceived against competing, similar online
 6 platforms. (*Id.* ¶¶ 6, 8). Public disclosure of this document would allow competitors that also
 7 offer similar online gaming platforms to discern NOA's confidential review of its own product.
 8 (*Id.* ¶¶ 4, 6, 8).

9 RX2106, RX2108, RX2109, and RX2111 are emails between NOA executives and
 10 Microsoft executives regarding the terms of a sensitive business negotiation. (Singer Decl. ¶ 9).
 11 NOA requests that they remain under seal for the same reasons stated in reference to Plaintiff's
 12 email exhibits – namely, that disclosure of these private emails would result in competitive harm
 13 to NOA. (*Id.* ¶¶ 4, 9). Alternatively, NOA seeks at minimum to seal the names and email
 14 addresses contained in the emails to protect the privacy of those individuals for the same reasons
 15 stated in reference to Plaintiff's email exhibits.

16 RX2001 and RX2002 are internal, confidential marketing campaign plans for specific
 17 NOA products and services. (Singer Decl. ¶ 11). RX2104, RX2116, RX2124, RX2125,
 18 RX2126, and RX2127 are internal presentations discussing and analyzing product market
 19 performance, customer relations, campaign themes, budgets, and corporate decision making. (*Id.*
 20 ¶ 10). Courts in this district have found that marketing materials are sealable. *See, e.g., In re*
 21 *Google Location Hist. Litig.*, 514 F. Supp. 3d 1147, 1162 (N.D. Cal. Jan. 25, 2021) (compelling
 22 reasons may exist to seal marketing strategies) (citation omitted). Disclosing this information
 23 would harm NOA's capability to distinguish itself in the market and risk competitors replicating
 24 or undermining NOA's business strategies. (Singer Decl. ¶¶ 4, 10-11). Public disclosure would
 25 allow competitors insight as to how NOA strategizes and conducts its marketing, a crucial and
 26 distinct component of NOA's overall business strategy. (*Id.* ¶¶ 4, 10-11).

27 RX2040, RX2058, RX2065, and RX2089 are internal, competitive outlook presentations
 28 containing summaries of how Nintendo analyzes and characterizes its competitors' strategic

1 differences. (Singer Decl. ¶ 12). Nintendo's internal reviews of competition and competitors are
 2 highly sensitive, and public disclosure would allow competitors to see how Nintendo competes
 3 against them, all of which would be detrimental to Nintendo's business. (*Id.* ¶¶ 4, 12). Courts
 4 have found such documents to be sealable. *See Hadley v. Kellogg Sales Co.*, 2018 U.S. Dist.
 5 LEXIS 224314, 2018 WL 7814785, at *2 (N.D. Cal. Sept. 5, 2018) (finding "compelling
 6 reasons" to seal information providing insight into "business strategies and internal decision
 7 making").

8 If the Court decides that it requires certain portions of NOA's documents to be made
 9 public, NOA respectfully requests that all the documents remain provisionally under seal until
 10 NOA can meet and to confer with the parties on which portions should remain redacted. It is
 11 currently unclear as to which portions of the documents the parties intend to rely on for the
 12 evidentiary hearing, making it difficult for NOA to make specific, targeted requests. NOA
 13 makes this request given the accelerated proceedings, time constraints, and highly sensitive
 14 nature of NOA's documents.

15 **IV. CONCLUSION**

16 For the foregoing reasons, Non-Party NOA respectfully request the Court to keep sealed
 17 Plaintiff's exhibits marked PX3066, PX3161, PX3219, PX3221, PX3270, PX8002 and
 18 Defendants' exhibits marked RX2001, RX2002, RX2040, RX2058, RX2065, RX2089, RX2096,
 19 RX2104, RX2106, RX2108, RX2109, RX2111, RX2116, RX2124, RX2125, RX2126 and
 20 RX2127.

21 Dated: June 21, 2023

VENABLE LLP

22
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